UB CO MANAGEMENT SDN BHD

v.

PERBADANAN KILANG FELDA

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[CIVIL SUIT NO: D2-22-817-1995]
20 SEPTEMBER 1997

CONTRACT: *Assignment - Assignment of benefit of contract to third party - Civil Law Act 1956, s. 4(3) - Applicability - Plaintiff not claiming debt assigned by deed of assignment - Whether applicability of s. 4(3) did not arise - Application to invoke O. 33 r. 2 Rules of the High Court 1980 - Trial of issue before trial proper - Whether to be dismissed*

The defendants and Penaga Engineering Sdn Bhd ('Penaga') had executed a contract ('the contract') by which Penaga undertook to carry out certain works for a consideration of RM2,074,000. Thereafter, the defendants, Penaga and the plaintiffs executed a deed of assignment, and by that Penaga assigned to the plaintiffs the progress payment due to them from the defendants under the contract. It was a term of the deed of assignment that the plaintiffs would utilize the progress payment towards settlement of an amount owing by Penaga to the plaintiffs.

The plaintiffs averred that the defendants, in breach of the contract, had only paid RM1,653,558.87 of the consideration aforesaid, and that being so, the plaintiffs claimed from the defendants the balance sum of RM420,441.13 allegedly due to Penaga under the contract. It was the plaintiffs' contention that under the deed of assignment they were entitled to the balance sum. The defendants retorted that the plaintiffs had no cause of action for a claim based on breach of contract, and in the circumstances applied under O. 33 r. 2 Rules of the High Court, 1980 for an order that the following question be tried before the trial proper, namely, whether the assignment herein was an absolute assignment falling under s. 4(3) of the Civil Law Act 1956 ('the Act'), such as to entitle the plaintiffs to proceed with the action against the defendants.

Held:

[1] The assignment under the deed of assignment was in respect of certified progress payments. The plaintiffs are suing for the balance which has not been certified as due and payable to Penaga. Clearly, therefore, that balance does not fall within the description of the thing assigned to the plaintiffs.

[2] Since the plaintiffs are not claiming the debt assigned by the deed of assignment, the question of the applicability of the effect of s. 4(3) of the Act to the assignment does not arise and there is no need to determine whether the assignment was absolute or not. The proper question to ask, in the circumstances, is whether the plaintiffs have the *locus standi* to make the claim.

[Application dismissed.]

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 33 r. 2

For the plaintiffs - Ainul Azam; M/s Nik Hisham, Ainul Azam & Fakihah
For the defendants - S Tan; M/s Abdullah & Zainuddin

Reported by Hjh Siti Faridah Abdul Jabbar

JUDGMENT

Abdul Aziz Mohamad J:

On 26 July 1990 the defendants and Penaga Engineering Sdn. Bhd. ("Penaga") executed a contract for the carrying out of certain works by Penaga. The contract price was RM2,074,000.

On 28 September 1990 the defendants, Penaga and the plaintiffs executed a deed of assignment whereby Penaga assigned to the plaintiffs the progress payments due to Penaga from the defendants under the contract. The consideration for the assignment was the plaintiffs' agreeing to utilise the progress payments towards settlement of an amount owing by Penaga to the plaintiffs.

The principal clauses of the deed of assignment are cls. 1 and 2, which are in these terms:

> 1. In consideration of the amount due by [Penaga] to [the plaintiffs] to be hereunder set off as against progress payments only under the contract and with the consent of [the defendants] [Penaga] as beneficial owner hereby assigns to [the plaintiffs] all progress payments lawfully due and payable by [the defendants] thereunder to [Penaga] TO HOLD the same unto [the plaintiffs] PROVIDED HOWEVER that such assignment shall exclude all Retention Funds or any such payment so retained by [the defendants] for purposes of the defects liability period.

2. (a) For the purposes aforesaid [Penaga] hereby authorises [the defendants] to effect all progress payments lawfully due and payable under the Contract to [the plaintiffs] as may have been certified payable and accordingly hereby agrees and undertakes to indemnify and keep indemnified [the defendants] against any claims, actions and demands that may arise in respect of such payments.

(b) The Certification by [the defendants] of payment hereunder shall be deemed to be final and conclusive.

Clause 8 provides as follows:

It is expressly agreed and understood between the parties hereto that this Deed shall be an assignment of progress payments only and [Penaga] shall continue and remain liable to [the defendants] under the terms of the Contract. Nothing in these presents shall be deemed to affect any of the terms and conditions of the Contract between [Penaga] and [the defendants].

In this action, filed on 27 December 1995, the plaintiffs, averring that the defendants have only paid RM1,653,558.87 of the contract price, are claiming the balance of RM420,441.13. They allege that the defendants have breached the contract with Penaga by appointing other contractors and paying the balance to them. They claim that the defendants are, under the deed of assignment, liable to pay them the balance. The defendants plead that they had to appoint other contractors to finish the works under the contract because of default of performance on the part of Penaga. Besides other things, the defendants maintain that under the deed of assignment the plaintiffs were entitled only to progress payments for works certified as having been carried out by Penaga and that any claim, based on breach of contract, to a disputed sum that has not been certified as due to Penaga is a matter between Penaga and the defendants, and the plaintiffs have no cause of action for such a claim, which is what their claim in this action is.

The defendant have applied under O. 33 r. 2, for an order that the following question be tried before the trial of the action:

Sama ada Penyerahanhak di bawah Perjanjian Serahanhak bertarikh 28hb September, 1990 adalah penyerahanhak mutlak selaras dengan Seksyen 4(3) Akta Undang-Undang Sivil, 1956 and dengan itu memberikan hak dan kuasa kepada Plaintif untuk membawa tuntutan ini terus terhadap Defendan.

Written submissions have been put in on the application.

Subsection (3) of s. 4 of the Civil Law Act 1956 provides as follows:

> (3) Any absolute assignment, by writing, under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim the debt or chose in action, shall be, and be deemed to have been, effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed in the State before the date of the coming into force of this Act, to pass and transfer the legal right to the debt or chose in action, from the date of the notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

Omitting the various qualifications, the essential ordinance of sub-s. (3) is as follows:

> (3) Any absolute assignment, ... not purporting to be by way of charge only, of any debt or other legal chose in action ... shall be ... effectual in law ... to pass and transfer the legal right to the debt or chose in action ... and all legal and other remedies for the same ...

If the thing assigned is a debt, and the assignment is an absolute one and does not purport to be by way of charge only, the legal right to the debt and the remedies for the debt pass to the assignee. So is also if the thing assigned is a chose in action.

Subsection (3) does not explain what an absolute assignment is. As the subsection is constructed, the phrase "not purporting to be by way of charge only "is not explanatory of the term "absolute assignment", but qualifies it so as to restrict the kind of absolute assignment that will have the effect enacted in the subsection. The effect of the subsection is restricted to absolute assignments that do not purport to be by way of charge only. In other words, as the subsection is constructed, there could be an absolute assignment that purports to be by way of charge only. Such an absolute assignment will, of course, not have the effect laid down by the subsection.

From the way the defendants have drafted the question to be tried, it is apparent that they are contending that the assignment of 28 September 1990 is not an absolute assignment and therefore sub-s. (3) does not apply to it and does not confer on the plaintiffs any right to bring the claim in this action against the defendants. After reading the pleadings, the deed of assignment and the defendants' written submission, it appears to me that the question is misconceived because I find that there is no need in this action to determine whether the assignment is or is not an absolute assignment.

As assignee resorts to sub-s. (3) in order to claim the thing assigned or the right to sue for it. It is, therefore, important to identify the thing that is assigned by a deed of assignment. If he has no need to claim the thing assigned or the right to sue for it, he does not need to resort to subsection (3) and there is no need to determine whether the assignment of the thing is absolute or not. The thing, according to sub-s. (3), is either a debt or a chose in action.

It is clear that the thing that was assigned to the plaintiffs by the deed of assignment in this case was a debt, being, as stated in cl. 1, "all progress payments lawfully due and payable by (the defendants) (under the contract) to (Penaga)", and being, as cl. 2(a) goes on to further qualify, progress payments "as may have been certified payable". The certificate intended there has to be the certificate of the engineer mentioned in cl. 38.3 of the contract, which says:

> No payment as provided shall become due or payable until [Penaga] has submitted an interim certificate approved under the hand of the engineer declaring the amount due to [Penaga] in respect of work done at the time of such certificate, the value of omission or extra works deducted from or added to the Contract Price, the amount already paid and the amount payable at the date of issue of such certificate. [Penaga] shall within the period specified in the Appendix for honouring of certificate of [the defendants] receiving the interim certificate authorised by the engineer become entitled to receive from [the defendants] the sum declared in the interim certificate aforesaid as being payable to [Penaga].

The assignment was, therefore, of progress payments certified due and payable. No sum was assigned but what would be certified due and payable. Certainly, as is made clear by cl. 8 of the deed of assignment, the contract, or the right of Penaga to sue the defendants for any alleged breach of contract, was not assigned to the plaintiffs.

Now the certified progress payments that were assigned to the plaintiffs are not the subject of the plaintiffs' claim in this action. They are not suing for those progress payments. Those have been settled. They are suing for the balance of the contract sum which has not been certified as due and payable to Penaga and which the defendants claim they were entitled to pay to other contractors because of Penaga's failure to complete the works. That balance does not fall within the description of the thing assigned to the plaintiffs by the deed of assignment.

As the plaintiffs are not claiming the debt assigned by the deed of assignment, namely the certified progress payments, the question of the applicability of the effect of sub-s. (3) to the assignment does not arise and accordingly there is no need to determine whether the assignment was absolute or not. I have,

however, after considering the defendants' written submission, not been able to agree with them on any point that they have raised for arguing that the assignment was not absolute and I would hold that the assignment of the certified progress payments was absolute, but since the answer to the question is really not necessary I shall not take time to state my reasons for disagreeing with them.

It does not, however, follow that because the assignment of the certified progress payments was absolute, the plaintiffs have the right to sue the defendants for the balance of the contract price. As I have shown, the question of the plaintiffs' right to sue does not depend on the question of whether the assignment is absolute or not. It depends on the question of what was assigned to them.

The proper question should be whether, in view of the fact that what was assigned to the plaintiffs by the deed of assignment were only certified progress payments, the plaintiffs have a claim to the balance of the contract sum against the defendants or have the *locus standi* to make the claim.

For those reasons I dismiss the application.

As relevant to the question of costs, I have to mention that the plaintiffs' argument seems to be that the assignment of 29 September 1990 was either an absolute assignment or an equitable assignment of Penaga's right to sue the defendant not only for the debt certified due and payable but also for disputed debts. It is tantamount to claiming that the assignment was of Penaga's rights generally against the defendants under the contract. It is clear from the deed of assignment that that was not so. What was assigned were only certified progress payments. It is therefore not any reason advanced by the plaintiffs that I dismiss the application. Moreover, while dismissing the application, I have, probably to a crucial extent, decided in the defendants' favour a question of law on which this action may largely depend, namely that of the extent or scope of the assignment. Although this is an application for an order to try a question of law, and not the trial of the question itself, it has not been possible to decide the application without actually having to construe the assignment and determine its scope and effect, more so as even both counsel themselves, in their submission on the application, could not avoid entering into the very question itself. As it is not by virtue of any argument of the plaintiffs that the defendants lose on the application and as, in losing on the application, they have gained considerable ground in the action, I order that costs be in the cause.